Supreme Court, U. S.
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No. 78-1743

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD J. VAUGHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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The lack of explicit guidance as to the retroactivity of *United States* v. *Chadwick*, 433 U.S. 1 (1977), has encouraged a growing dispute over this issue. Since the filing of the Petition in this case, additional courts have aligned themselves with *United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978), and have squarely held *Chadwick* to be retroactive. *People* v. *Minjares*, 24 Cal.3d 410, ... P.2d ..... (1979); *Metcalfe* v. *State*, 593 P.2d 638, 640 (Alaska 1979). At least one other court has expressly followed

those decisions in the Second, Fifth and Seventh Circuits [1] holding *Chadwick* to be non-retroactive. *Commonwealth* v. *Berman,* ..... Pa.Super. ....., 396 A.2d 1237, 1240 n.2 (1978). *See also Mooney* v. *State,* 243 Ga. 373, ... S.E.2d ..... (1979).

Moreover, since the filing of the Petition in this case, this Court has itself applied *Chadwick* retroactively to a case involving a search occurring prior to the date of the *Chadwick* decision. *Arkansas* v. *Sanders,* No. 77-1497, decided June 20, 1979. The *Sanders* opinion casts such grave doubt on those decisions—including the instant one—which have refused to apply *Chadwick* retroactively, that a remand of this case for further consideration in light of *Sanders* is appropriate.

The government argues that this case is not worthy of review because the defendant "abandoned" the suitcase prior to the search. The government's presentation of the abandonment issue is, of course, entirely one-sided.[2] More-

[1] *U.S.* v. *Reda,* 563 F.2d 510 (2d Cir. 1977); *U.S.* v. *Montgomery,* 588 F.2d 311 (5th Cir. 1977); *U.S.* v. *Berry,* 571 F.2d 2 (7th Cir. 1978).

[2] Petitioner was alighting from an automobile in order to retrieve the suitcase on foot when he was arrested. Trans. at 69-70, 76. After being taken into custody and before the search, petitioner told the police in response to their questioning that the suitcase was his and that he wanted it returned to him. Trans. at 59, 63. The Ninth Circuit obviously found the issue of abandonment a difficult one since it remanded to the district court for findings on the issue, even though it had been fully briefed on appeal by both sides.

The government's further argument that petitioner "consented" to the search of his bag is spurious. The police officer testified that he asked petitioner for the combination to the suitcase only after he had already decided to open it anyway. Trans. at 49. Unless petitioner wanted his luggage ruined, he had little choice but to provide the officer with the combination. In view of these facts, the government did not even argue "consent" in either the district court or the Court of Appeals, and voluntarily waived the issue.

over, the possible existence of another issue in this case in no way makes it an inappropriate vehicle for resolving the issue of *Chadwick's* retroactive effect. This issue is squarely presented in the opinion and order from which review is sought.

This Court should provide specific guidance on the issue of *Chadwick's* retroactivity, in order to assure an equal and non-discriminatory application of the important constitutional principles set forth in that decision, by (1) granting certiorari in this case, or (2) granting certiorari and remanding this case to the Ninth Circuit for further consideration in light of *Arkansas* v. *Sanders, supra.*

Respectfully submitted,

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